IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
April 3, 2002 Session

MILDRED HOWELL AND DILLON HOWELL
v.
BAPTIST HOSPITAL, NEIL PRICE, M.D., AND JOSEPHINE VICENTE, R.N.

An Appeal from the Circuit Court for Davidson County
No. 99C-3472 Walter Kurtz, Judge

No. M2001-02388-COA-R3-CV - Filed January 14, 2003

This is a medical malpractice case. In January 1999, the plaintiff underwent an endoscopic medical procedure performed by the defendant physician. During the procedure, the plaintiff developed multiple air emboli in her brain, which resulted in permanent neurological difficulties. The plaintiff and her husband sued the physician, claiming that the plaintiff's injuries were due to the physician's negligence. The physician moved for summary judgment and submitted his own affidavit in support. In response, the plaintiffs submitted affidavits of two medical experts, asserting that the defendant physician had breached the applicable standard of care. The trial court granted the physician's motion for summary judgment, concluding that the plaintiffs' experts' affidavits did not comply with Tennessee Code Annotated § 29-26-115. The plaintiffs moved to alter or amend the judgment, submitting an amended affidavit and curriculum vitae of one of the two experts. The trial court refused to consider the additional evidence and denied the motion. The plaintiffs now appeal. We affirm in part and reverse in part, concluding that, while the trial court did not err in finding that the initial expert affidavits submitted by the plaintiffs were insufficient, the trial court abused its discretion in failing to consider the amended affidavit and curriculum vitae submitted by the plaintiffs.

Tenn. R. App. P. 3, Appeal as of Right; Judgment of the Circuit Court is Affirmed in Part, Reversed in Part, and Remanded

HOLLY KIRBY LILLARD, J., delivered the opinion of the court, in which W. FRANK CRAWFORD, P.J., W.S., and ALAN E. HIGHERS, J., joined.

Larry D. Ashworth and Peter D. Heil, Nashville, Tennessee, for the appellants, Mildred Howell and Dillon Howell.

E. Reynolds Davies, Jr., and John T. Reese, Nashville, Tennessee, for the appellee, Neil Price, M.D.

OPINION

On January 19, 1999, Plaintiff/Appellant Mildred Howell ("Mrs. Howell"), a 53-year-old female with a history of cirrhosis of the liver, was admitted as an outpatient at Baptist Hospital for an elective procedure called an esophagogastroduodenoscopy[1] ("EGD") for banding of esophageal varices. Defendant/Appellee Neil Price, M.D. ("Dr. Price"), performed the EGD. During the procedure, Mrs. Howell was sedated by defendant Josephine Vicente, R.N. ("Vicente"), with a titration of Sublimaze and Versed. Vicente was neither an anesthesiologist nor a certified registered nurse anesthetist. At 3:52 p.m., Mrs. Howell's blood pressure was 102/55. Three minutes later, at 3:55 p.m., her blood pressure dropped to 72/36. After the EGD was completed at 4:01 p.m., Mrs. Howell could not be aroused. Dr. Price gave her Romazicon, Narcan, and then more Versed in an attempt to arouse her, but she remained unresponsive. Subsequent CT scans of the brain showed multiple air emboli. After the emboli were discovered, Mrs. Howell was transferred to the neurological intensive care unit at the hospital under the care of her treating internist, Sally Killian, M.D., where she was placed on life support. Subsequently, Mrs. Howell was transferred emergently to Vanderbilt Medical Center. Mrs. Howell underwent extensive rehabilitation and presently retains a neurological deficit due to brain damage she suffered because of the air emboli.

On December 14, 1999, Mrs. Howell and her husband, Dillon Howell (collectively "the Howells"), filed this complaint for medical malpractice against Baptist Hospital, Dr. Price, nurse Vicente, Anita Murphy, R.N., and Dianne I. Heme, R.N. The complaint alleged that the defendants breached the applicable standard of care in treating Mrs. Howell in the following ways: (1) by failing to conduct adequate tests that would have allowed Dr. Price to make a correct diagnosis of her air emboli, (2) by failing to ensure that an anesthesiologist or a nurse anesthetist was present during the EGD, (3) by failing to obtain Mrs. Howell's informed consent to undergo the procedure without the aid of an anesthesiologist or a nurse anesthetist, (4) by failing to inform Mrs. Howell of the risks involved with the administration of the procedure, and (5) by failing to recognize her physical distress during the EGD. The Howells alleged that the facts and circumstances warranted the inference of negligence under the doctrine of *res ipsa loquiter*. By agreement of the parties, defendant nurses Murphy and Heme were dismissed from the lawsuit.

On February 2, 2001, Dr. Price filed a motion for summary judgment, arguing that no genuine issue of material fact existed with regard to whether he complied with the standard of care (1) in his treatment of Mrs. Howell, nor (2) in obtaining her informed consent prior to the surgery. Dr. Price also argued that no genuine issue of material fact existed as to whether any alleged deviations from the standard of care actually caused any of Mrs. Howell's injuries. He maintained that the doctrine of *res ipsa loquitur* did not apply.

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[1] An esophagogastroduodenoscopy is "the examination of the esophagus, stomach and duodenum to look for ulcers, tumors, inflamation, and areas of bleeding. Biopsy, cytology, specimen collection and dilation of strictures may be necessary."

In support of his motion for summary judgment, Dr. Price submitted his own affidavit. In that affidavit, Dr. Price stated that he had been licensed to practice medicine in Tennessee continuously since 1987, and that he was familiar with the recognized standard of care as those standards existed in Nashville in January 1999, in performing EGDs and variceal banding procedures, and in obtaining a patient's informed consent for those procedures. He asserted that he had discussed with Mrs. Howell the risks, benefits, and potential complications associated with EGD procedures. Dr. Price conceded that he did not discuss with Mrs. Howell the potential risk of cerebral air emboli, but claimed that this was because air emboli occur so infrequently that disclosure of the risk was not required. Dr. Price attested that he complied with the recognized standard of care during and after performance of the EGD and variceal banding procedures, and that Mrs. Howell's injuries can and do occur in the absence of negligence.[2] He asserted that his conduct did not cause Mrs. Howell to suffer injuries that would not have otherwise occurred. Dr. Price attached to his affidavit a copy of Mrs. Howell's information and consent form that she had signed prior to the procedure.[3]

On March 19, 2001, the Howells filed a motion to amend their complaint to add a claim of medical battery based on the allegation that Dr. Price performed the banding procedures when, in fact, there had been no variceal bleeding. On March 23, 2001, the Howells filed a memorandum in opposition to Dr. Price's motion for summary judgment, which was supported by the affidavits of Ronald J. Gordon, M.D. ("Dr. Gordon"), and Michael A. Todd, M.D. ("Dr. Todd").

In his supporting affidavit, Dr. Gordon stated that he had been licensed to practice medicine in Tennessee for one year preceding the date of the allegedly negligent acts, and that he had been continuously licensed to practice in Tennessee since that time. Dr. Gordon said that he is a board certified anesthesiologist practicing in middle Tennessee, and that he has been "Chief of the Anesthesiology Department at Southern Tennessee Medical Center from June of 1989 to present and an Associate Professor of Anesthesiology at Vanderbilt University Hospital." With respect to the applicable standard of care, Dr. Gordon asserted in paragraph eleven:

> 11. I am familiar with the recognized level of acceptable professional practice regarding the treatment of patients undergoing endoscopic medical procedures in Middle Tennessee, as it existed in January of 1999 and all times relative to this suit.

Dr. Gordon opined that, within a reasonable degree of medical certainty, Dr. Price had violated the applicable standard of care in not having a qualified anesthesiologist or nurse anesthetist administer the anesthesia to Mrs. Howell before her EGD. He also stated that Dr. Price breached the standard

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[2]Dr. Price's affidavit does not address his failure to have an anesthesiologist or a nurse anesthetist present during the procedure, nor his apparent failure to inform Mrs. Howell that no anesthesiologist or nurse anesthetist would be present, and the risks resulting therefrom. Consequently, it is unclear why partial summary judgment was granted as to these claims in the Howells' complaint.

[3]Dr. Price also attached information and consent forms signed by Mrs. Howell for EGD and other procedures that he had performed on her previously.

of care in failing to take appropriate action when Mrs. Howell's blood pressure dropped precipitously toward the end of the procedure. In addition, Dr. Gordon asserted that Dr. Price's failure to conduct a sufficient post-operative medical exam or order reasonable post-operative tests adversely affected his ability to diagnose her air embolism in a timely manner. Finally, Dr. Gordon stated that Dr. Price improperly administered Versed following the dose of Romazicon, because that treatment further delayed Mrs. Howell's diagnosis and treatment. Dr. Gordon asserted that the injuries suffered by Mrs. Howell would not have occurred but for the negligence of Dr. Price.

The affidavit of Dr. Todd was submitted to the trial court on June 8, 2001. Dr. Todd stated that he had been licensed to practice medicine in Tennessee for one year preceding the date of the incident in question, and that he had continued to be licensed since that date. He stated that he had specialized in clinical pathology since 1980, and that he was "familiar with the recognized standard of acceptable professional practice for the treatment of patients with gastrointestinal disorders and esophageal varices." Dr. Todd asserted that "[i]t is well known to the medical profession . . . that patients can suffer a permanent brain injury if air is infused or allowed to enter the blood stream." He further opined that "the cerebral air embolus Mildred Howell suffered does not occur in the absence of negligence," supporting the Howells' claim that the doctrine of *res ipsa loquitur* should apply in this case. Dr. Todd also stated that Dr. Price had violated the applicable standard of care by failing to warn Mrs. Howell of the potential risk of a cerebral air embolus.

On July 13, 2001, the trial court entered an order and memorandum opinion on the Howells' motion to amend the complaint to allege medical battery, as well as Dr. Price's motion for summary judgment on the Howells' claims for medical malpractice and lack of informed consent. The trial court first granted the Howells' motion, permitting them to add a claim for medical battery. However, the trial court then granted Dr. Price's motion, dismissing the Howells' claims for medical malpractice and lack of informed consent. The trial court held that the affidavit of Dr. Gordon was insufficient in that Dr. Gordon did not indicate that he had knowledge of the standard of care in Nashville or a similar community in January 1999, nor did he state that he had knowledge of the standard of care specifically for gastroenterologists. The trial court determined that Dr. Gordon's statement regarding his position at Vanderbilt University was ambiguous, because it did not clarify when Dr. Gordon served in that position. Thus, the trial court concluded that "[t]he affidavit of Dr. Gordon does <u>not</u> indicate knowledge of the standard of care for gastroenterologists nor does it indicate that he had a knowledge of the standard of care in Nashville or a similar community in January, 1999." As to the supporting affidavit filed by Dr. Todd, the trial court determined that Dr. Todd's affidavit was insufficient, because "it [did] not state that [Dr. Todd] was familiar with standard of care in Nashville and similar communities in January, 1999 nor [did] it state that he was familiar with the standard of care for the specialty of gastroenterology." Finally, the trial court observed that the doctrine of *res ipsa loquitur* is not a separate cause of action, but rather a method of proving professional negligence, and that application of the doctrine would have to be supported by expert testimony. Because the affidavits submitted by the Howells were struck, the trial court

rejected application of the doctrine of *res ipsa loquitur* to prove their claims. Accordingly, the trial court granted Dr. Price's motion for partial summary judgment.[4]

On August 3, 2001, the Howells filed a motion pursuant to Rule 59.04 of the Tennessee Rules of Civil Procedure to alter or amend the trial court's order, asking the trial court to permit them to supplement the record to include Dr. Gordon's curriculum vitae and amended affidavit. In the amended affidavit, Dr. Gordon clarified that he had been an associate professor at Vanderbilt University "from 1988 to the present." In addition, Dr. Gordon revised paragraph eleven by replacing it with the following:

> 11. I am familiar with the recognized standard of acceptable professional care and practice for gastroenterologist[s] in the treatment of patients undergoing endoscopic medical procedures in Nashville, Tennessee and similar communities, as it existed in January of 1999 and all times relative to this suit.

The remainder of the amended affidavit was the same as the original. Dr. Gordon's curriculum vitae indicated that Dr. Gordon was a visiting associate professor and consultant at Vanderbilt University Medical Center in Nashville, Tennessee and that he had held that position continuously since 1988.

On August 31, 2001, the trial court entered an order denying the Howells' motion to alter or amend. The trial court stated that, "[f]ollowing review of the entire record in this cause, arguments of counsel for the plaintiffs and the defendant Neil Price, M.D., as well as an analysis of the Motion pursuant to ***Harris v. Chern*** [33 S.W.3d 741 (Tenn. 2000)], the Court is of the opinion that the plaintiffs' Motion is not well taken and should be **DENIED**." The trial court also entered an order making its July 13, 2001 order entered final and appealable. From that order, the Howells now appeal.

On appeal, the Howells argue that the trial court erred in granting Dr. Price's motion for partial summary judgment. They assert that the trial court failed to draw the reasonable inference from Dr. Gordon's original affidavit that he was familiar with the applicable standard of care in Nashville as it existed in January 1999. The Howells also contend that the trial court applied the wrong standard in assessing Dr. Gordon's affidavit, because it found the affidavit insufficient in that Dr. Gordon did not have "knowledge of the standard of care for gastroenterologists." Finally, the Howells argue that the trial court erroneously applied the standard in ***Harris v. Chern*** in denying their motion to alter or amend to include the additional information in Dr. Gordon's revised affidavit and curriculum vitae.

We first consider the trial court's grant of partial summary judgment. A grant of summary judgment is reviewed de novo with no presumption of correctness. ***Warren v. Estate of Kirk***, 954 S.W.2d 722, 723 (Tenn. 1997). Summary judgment is appropriate where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any,

[4]The claim against Dr. Price based on medical battery was not dismissed and remained pending.

show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Tenn. R. Civ. P. 56.04. We must view the evidence in a light most favorable to the nonmoving party, giving that party the benefit of all reasonable inferences. ***Warren***, 954 S.W.2d at 723 (quoting ***Bain v. Wells***, 936 S.W.2d 618, 622 (Tenn. 1997)). Once the moving party demonstrates that no genuine issues of material fact exist, the nonmoving party must demonstrate, by affidavits or otherwise, that a disputed issue of material fact exists for trial. ***Byrd v. Hall***, 847 S.W.2d 208, 211 (Tenn. 1993). When a trial court makes determinations regarding the "admissibility, qualifications, relevancy and competency" of expert testimony, we will uphold those determinations absent an abuse of discretion.[5] ***See McDaniel v. CSX Transp., Inc.***, 955 S.W.2d 257, 263 (Tenn. 1997); ***see also Tilley v. Bindra***, No. W2001-01157-COA-R3-CV, 2002 Tenn. App. LEXIS 349, at *10 (Tenn. Ct. App. May 13, 2002).

The plaintiff's burden in a medical malpractice action is set out in Tennessee Code Annotated § 29-26-115, which states:

> (a) In a malpractice action, the claimant shall have the burden of proving by evidence as provided by subsection (b):
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> (1) The recognized standard of acceptable professional practice in the profession and the specialty thereof, if any, that the defendant practices ***in the community in which the defendant practices or in a similar community at the time the alleged injury or wrongful action occurred*** . . . .
>
> (b) No person in a health care profession requiring licensure under the laws of this state shall be competent to testify in any court of law to establish the facts required to be established by subsection (a), unless the person was licensed to practice in the state or a contiguous bordering state a profession or specialty which would make the person's expert testimony relevant to the issues in the case and had practiced this profession or specialty in one (1) of these states during the year preceding the date that the alleged injury or wrongful act occurred . . . .

Tenn. Code Ann. § 29-26-115(a) - (b) (Supp. 2002) (emphasis added); ***see Church v. Perales***, 39 S.W.3d 149, 166 (Tenn. 2000). The statute requires that a plaintiff submit proof of the applicable standard of care in the same or similar community in which the defendant practices, as that standard

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[5]The Howells argue that we should afford no deference to the trial court's conclusions relating to the sufficiency of the testimony of Dr. Gordon, because the issue on appeal involves the interpretation of an affidavit, rather than an assessment of Dr. Gordon's credibility as a "live" witness. ***See Wells v. Tennessee Board of Regents***, 9 S.W.3d 779, 783-84 (Tenn. 1999). The Howells' argument, however, is misplaced. The rule allowing an appellate court to review de novo a trial court's credibility determinations that are based on a "cold" record is not applicable here, where we are called upon to review the trial court's determination regarding the qualifications of an expert witness. Such determinations are within the broad discretion of the trial court. ***See McDaniel v. CSX Transp., Inc.***, 955 S.W.2d 257, 263 (Tenn. 1997), ***cited in Robinson v. LeCorps***, No. M1999-01581-SC-R11-CV, 2002 Tenn. LEXIS 380, at *16 (Tenn. Sept. 5, 2002).

existed at the time the wrongful conduct occurred. This requirement is commonly referred to as the "locality rule." ***See Mabon v. Jackson-Madison County Gen. Hosp.***, 968 S.W.2d 826, 831 (Tenn. Ct. App. 1997); ***see also Tilley***, 2002 Tenn. App. LEXIS 349, at *12. "Without this requisite threshold evidence of the standard of care in the locality, a plaintiff cannot demonstrate a breach of duty." ***Mabon***, 968 S.W.2d at 831.

In this case, the trial court's rejection of Dr. Gordon's affidavit was based, in part, on its conclusion that the affidavit did not indicate that Dr. Gordon had knowledge of the standard of care in Nashville or a similar community in January 1999. The Howells argue that, in reaching this conclusion, the trial court erroneously drew all inferences in favor of Dr. Price, rather than in favor of the Howells, the nonmovants. They assert that, in paragraph eleven of Dr. Gordon's affidavit, the reference to the standard of care in "Middle Tennessee" necessarily included Nashville. The Howells contend that Nashville must have been implied in that reference, because paragraph six of the affidavit stated that Dr. Gordon had been "Chief of the Anesthesiology Department at Southern Tennessee Medical Center from June of 1989 to present and an Associate Professor of Anesthesiology at Vanderbilt University Hospital."[6] They maintain that the trial court should have interpreted that statement to mean that Dr. Gordon had held the positions at both Southern Tennessee Medical Center and Vanderbilt University Hospital continuously since 1989, and that because Dr. Gordon maintained his position as an associate professor at Vanderbilt University Hospital in Nashville at the pertinent time, he must be familiar with the applicable standard of care in the Nashville community, as is required under the statute. In sum, the Howells argue that, if paragraph eleven is read in conjunction with paragraph six, it is reasonable to infer that the reference to "Middle Tennessee" in paragraph eleven means Nashville.

Thus, in this appeal, we must determine whether it can be reasonably inferred that knowledge of the standard of care in "Middle Tennessee," when considered in the context of Dr. Gordon's affidavit as a whole, means knowledge of the standard of care in Nashville. While the Howells make a cogent argument and the question is close, in light of pertinent case law and the high standard of review, we must conclude that the trial court did not err in finding that such an inference cannot reasonably be made from the affidavit alone.

The Tennessee Supreme Court has recently upheld a strict application of the locality rule in ***Robinson v. LeCorps***, No. M1999-01581-SC-R11-CV, 2002 Tenn. LEXIS 380 (Tenn. Sept. 5, 2002). In ***Robinson***, the Court declined to adopt a national standard of professional care for malpractice actions, but instead adhered to the statutory requirement that the plaintiff's expert "must have knowledge of the standard of professional care in the defendant's applicable community or knowledge of the standard of professional care in a community *that is shown to be similar* to the defendant's community." ***Robinson***, 2002 Tenn. LEXIS 380, at *14. In support of its reasoning, the Court cited with approval this court's decision in ***Mabon v. Jackson-Madison County Gen. Hosp.***, 968 S.W.2d 826, 831 (Tenn. Ct. App. 1997). In ***Mabon***, the defendant physician practiced

[6]Southern Tennessee Medical Center is located in Winchester, Tennessee, and Vanderbilt University Hospital is located in Nashville, Tennessee; however, the affidavit does not state the location of the two medical facilities.

in Jackson, Tennessee. To establish the requisite standard of care under the statute, the plaintiff's expert stated in his affidavit that he was "familiar with the recognized standard of acceptable medical practice . . . in an area such as Jackson, Tennessee," and that "the standard of care in Jackson . . . would be comparable to the cities and facilities at which he had practiced medicine." ***Mabon***, 968 S.W.2d at 828. From the expert's deposition testimony, however, it became apparent that he had no knowledge about Jackson's medical community, nor did he have any evidence on which to base his opinion that the standard of care in Jackson was the same nationwide. ***Id.*** at 830-31. We emphasized that the plaintiff has the burden of establishing the requisite standard of care in a medical malpractice action:

> It is the plaintiff who is charged with the burden of proof as to the standard of care in the community in which the defendant practices or in a similar community. . . . A plaintiff who chooses to prove the standard of care in a similar community necessarily must prove that community is similar to the one in which the defendant practices. To shift this burden to the defendant directly contradicts the plain language of the statute and would render the statute a nullity. Under the principles of summary judgment, once [the defendant] moved for summary judgment and submitted an affidavit stating that he complied with the standard of care in Jackson, the burden then shifted to [the plaintiff] to set forth specific facts that [the defendant] failed to meet the standard of care in Jackson or a similar community.

Id. at 831. Because the plaintiff's expert did not set forth specific facts showing that he was familiar with the standard of care in Jackson, or that the standard with which he was familiar pertained to a community similar to Jackson, we upheld the grant of summary judgment in favor of the defendant. ***Id.*** at 831.

Another recent case, ***Tilley v. Bindra***, No. W2001-01157-COA-R3-CV, 2002 Tenn. App. LEXIS 349 (Tenn. Ct. App. May 13, 2002), supports a strict application of the locality rule. In ***Tilley***, the plaintiff alleged that the defendant otolaryngologist committed malpractice in Dyersburg, Tennessee. The defendant moved for summary judgment, submitting his own affidavit in support. The defendant physician's affidavit stated that he fully complied with the standard of care required of an otolaryngologist in Dyersburg. ***Tilley***, 2002 Tenn. App. LEXIS 349, at *3. In response, the plaintiff filed an affidavit of a medical expert who asserted that the defendant had violated the applicable standard of care for an otolaryngologist in the State of Tennessee, without specifying Dyersburg or another community. In his deposition, the plaintiff's expert admitted that he had only practiced in Knoxville, Tennessee, and that he had never been to Dyersburg.[7] The expert testified that he assumed that the standard of care for an otolaryngologist would be the same statewide. The defendant then filed a renewed motion for summary judgment, apparently arguing that the plaintiffs' expert lacked knowledge of the applicable standard of care in the Dyersburg community. Subsequently, in a supplemental affidavit, the plaintiffs' expert cited statistics about the hospital and

[7] The defendant elected not to argue his motion for summary judgment until after the deposition of the plaintiff's expert had been taken. ***Tilley***, 2002 Tenn. App. LEXIS 349, at *4.

the medical community in Dyersburg, and asserted that he was familiar with the standard of care in Dyersburg or in a similar community. ***Id.*** at *6. The trial court granted the defendant's motion for summary judgment, finding, among other things, that the plaintiff's expert was not competent to testify as an expert witness as to the standard of care in Dyersburg. ***Id.*** at *7. This Court upheld the trial court's conclusion that the expert was not competent to testify on that subject, and determined that his supplemental affidavit was insufficient to establish the requisite familiarity with the applicable standard of care because it did not provide "trustworthy facts or data sufficient to provide a basis for his opinion." ***Id.*** at *19; ***see Roberts v. Bicknell,*** No. W2000-02514-COA-R3-CV, 2001 Tenn. App. LEXIS 605, at *7 (Tenn. Ct. App. Aug. 16, 2001) (stating that an expert's opinion must be based on "trustworthy facts or data sufficient to provide some basis for the opinion"); ***Spangler v. East Tennessee Baptist Hosp.***, No. E1999-01501-COA-R3-CV, 2000 Tenn. App. LEXIS 121, at *1-*2 (Tenn. Ct. App. Feb. 28, 2000) (concluding that supplemental affidavit, which recited that plaintiff's expert was familiar with standard of care in the same or similar community, was insufficient because it simply tracked the statutory language and was submitted after the expert had testified that the standard of care did not vary from community to community).

In the instant case, in reviewing the trial court's grant of partial summary judgment, we consider only Dr. Gordon's affidavit. No evidence was adduced to identify the "Middle Tennessee" communities with which Dr. Gordon was familiar, and in particular whether the reference to Middle Tennessee was intended to include Nashville. Assuming it can be inferred from the affidavit that Dr. Gordon was familiar with the applicable standard of care in Winchester, Tennessee, where Southern Tennessee Medical Center is located, the affidavit does not indicate that the standard of care in Winchester is similar to that in Nashville. Dr. Gordon's statement in paragraph six that he was an associate professor at Vanderbilt University Hospital does not illuminate the reference to "Middle Tennessee" in paragraph eleven, because paragraph six is too vague as to time and duration to reasonably infer that Dr. Gordon was familiar with the applicable standard of care in Nashville in January of 1999. While the question is close, under pertinent caselaw, and considering the abuse of discretion standard on appeal for reviewing a trial court's determination regarding the admissibility and competency of expert testimony, we cannot say that the trial court erred in determining that the reference to "Middle Tennessee" in paragraph eleven is too broad to satisfy the requirements of the locality rule. Consequently, we must affirm the trial court's conclusion that the information provided in Dr. Gordon's affidavit is insufficient to establish that he was familiar with the applicable standard of care in Nashville during the pertinent time period.[8]

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[8] The Howells do not argue on appeal that the trial court erred in concluding that Dr. Todd's affidavit was insufficient. Dr. Todd's affidavit supported the Howells' theories of recovery based on the failure to warn and the doctrine of *res ipsa loquitur*, and also served as evidence of causation. Because the Howells have not raised the issue on appeal, we uphold the trial court's decision to strike Dr. Todd's affidavit.

We note, however, that Dr. Todd's affidavit fails to meet the requirements of the locality rule. Nowhere in his affidavit does Dr. Todd state that he is aware of the standard of care in Nashville or a similar community. In fact, Dr. Todd states only that he was licensed to practice medicine in Tennessee, that he specializes in pathology, and that he is "familiar with the recognized standard of acceptable practice for the treatment of patients with gastrointestinal disorders and esophageal varices." He does not mention locality anywhere in his affidavit. As we have stated, "[w]ithout this requisite threshold evidence of the standard of care in the locality, a plaintiff cannot demonstrate a breach of duty." (continued...)

The Howells also argue on appeal that, even if the trial court correctly found Dr. Gordon's original affidavit insufficient, it should have granted their motion to revise the summary judgment, based on the newly submitted affidavit of Dr. Gordon and the addition of Dr. Gordon's curriculum vitae.[9] As noted above, both the amended affidavit and the curriculum vitae indicated that Dr. Gordon had been a visiting professor at Vanderbilt University Medical Center in Nashville during the pertinent time period. The amended affidavit also included wording that more closely tracked the language in Tennessee Code Annotated § 29-26-115(a)(1), stating that Dr. Gordon was "familiar with the recognized standard of acceptable professional care and practice for gastroenterologist[s] in the treatment of patients undergoing endoscopic medical procedures in Nashville, Tennessee and similar communities, as it existed in January of 1999." The Howells argue that the trial court erred in finding that the ***Harris*** factors weighed in favor of declining to consider their motion. ***See Harris v. Chern***, 33 S.W.3d 741, 744 (Tenn. 2000). We review the trial court's decision for an abuse of discretion. ***Id.*** at 746 (citing ***Donnelly v. Walter***, 959 S.W.2d 166, 168 (Tenn. Ct. App. 1997)).

In ***Harris***, the Tennessee Supreme Court rejected a strict application of the "newly discovered evidence standard" or "new evidence rule" for motions to revise orders granting summary judgment. ***Id.*** at 745-46. Instead, the Court delineated five factors that courts should balance and "make adequate findings of fact and conclusions of law on the record to support those findings." ***Id.*** at 745. Those factors are as follows:

> 1) the movant's efforts to obtain evidence to respond to the motion for summary judgment;
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> 2) the importance of the newly discovered evidence to the movant's case;
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> 3) the explanation offered by the movant for its failure to offer the newly submitted evidence in its failure to offer the newly submitted evidence in its initial response to the motion for summary judgment;

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[8](...continued)
Mabon, 968 S.W.2d at 831. Consequently, even if the Howells had sought to rely on the affidavit of Dr. Todd, it would have been deemed insufficient based on its failure to satisfy the locality rule.

[9]Though the Howells styled their motion as a "Motion to Alter or Amend Court's Order" pursuant to Tennessee Rule of Civil Procedure 59.04, the trial court properly considered it a motion to revise a non-final judgment under Rule 54.02, because the July 13, 2001 order granting partial summary judgment had not been made final when the Howells filed their motion to amend. Indeed, "Rule 54.02 applies to cases, such as this one, in which judgment was not entered as to all of the defendants or claims." ***Harris v. Chern***, 33 S.W.3d 741, 743 (Tenn. 2000). Nevertheless, Tennessee courts have expressly adopted the analysis in ***Harris,*** applicable to Rule 54.02 motions to revise, in considering Rule 59.04 motions to amend. ***See Stovall v. Clarke***, No. M2001-00810-COA-R3-CV, 2002 Tenn. App. LEXIS 437, at *20-*21 (Tenn. Ct. App. June 20, 2002); ***Smith v. Haley***, No. E2000-001203-COA-R3-CV, 2001 Tenn. App. LEXIS 136, *15-16 (Tenn. Ct. App. March 2, 2001).

4) the likelihood that the nonmoving party will suffer unfair prejudice; and

5) any other relevant factor.

Id. The Court reasoned that giving courts the discretion to consider other circumstances strikes the appropriate balance between the need to bring litigation to an end and the need to render a just decision based on all of the pertinent facts.[10] ***Id.***

The trial court below applied the ***Harris*** factors to the instant case and concluded that the circumstances did not warrant consideration of the curriculum vitae and the revised affidavit. In applying the ***Harris*** factors, the trial court noted that factor two weighed in favor of revising the judgment, because the newly submitted evidence was "of some importance surely because if [the court] considered the Affidavit, it might save the malpractice claim." In considering factors one and three, however, the trial court found deficient the Howells' efforts to obtain the new evidence and their explanation for failing to offer the new evidence at an earlier time. The court reasoned:

> I don't read this [Harris v. Chern] case as saying to the bar or the trial judges, well, look, if you argue a summary judgment and you are the [ ]movant and you lose because the judge says there is a factor missing, that you are now allowed under [Harris v. Chern] to come back and say, Judge, you ruled against me and said that while I showed X and Y, I didn't show Z. Well, you know, now here is Z; here are a couple of affidavits on Z, so now since I have filled this hole you found earlier, just reverse yourself, deny the summary judgment and the case goes forward.
>
> I just don't think that's what they are saying. I think there really has to be a cogent explanation for the failure to present it the first time around.

With respect to factor four, unfair prejudice to the nonmovant, the trial court determined that Dr. Price would suffer some prejudice if the Howells were allowed to resurrect their malpractice claim based on the tardy revised affidavit. The trial court concluded that, in light of all of those factors, "and considering that there should be some definiteness to rulings on summary judgment and that they not be litigated in some bifurcated manner and that counsel [should] not be allowed to come back and fill a hole when the judge finds that he hadn't prevailed at the argument[,] that this motion will be respectfully overruled."

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[10]The Court identified the opposing viewpoints through its discussion of ***Schaefer v. Larsen***, 688 S.W.2d 430 (Tenn. Ct. App. 1984), applying the more lenient standard, and ***Bradley v. McLeod***, 984 S.W.2d 929 (Tenn. Ct. App. 1998), which rejected the more lenient standard in favor of the strict "new evidence" standard. ***Compare Schaefer***, 688 S.W.2d at 433 (reasoning that a litigant seeking to revise an order granting summary judgment "is only seeking that which he is basically entitled to — a first trial"), ***with Bradley***, 984 S.W.2d at 933 (stating that a Rule 59.04 motion should not be used to introduce new evidence or arguments "that could have been adduced and presented while the summary judgment motion was pending").

On appeal, the Howells argue that the trial court abused its discretion in its application of the five ***Harris*** factors. With respect to factor one, while the Howells admittedly did not submit the curriculum vitae and the revised affidavit in response to the motion for summary judgment, they assert that their reason for not doing so was defensible. Prior to the trial court's initial ruling, they believed that the affidavits of Dr. Gordon and Dr. Todd were sufficient under the statute, particularly when those affidavits were viewed in a light most favorable to them, the nonmovants. They argue that the trial court applied "hypertechnical semantics" and applied "too strict a standard in assessing Dr. Gordon's original affidavit," and that the supplemental affidavit was offered post-judgment "to address any clerical-type objections" in the original one. With respect to factor two, the importance of the new evidence, it is not in dispute, as the trial court noted, that the information in the revised affidavit of Dr. Gordon was critically important to their case, because without it the medical malpractice and informed consent claims against Dr. Price would fail. In addition, with respect to factor four, the Howells contend that any prejudice to Dr. Price would not be unfair because if Dr. Price believes that Dr. Gordon is truly unqualified to testify, he would have the opportunity to depose Dr. Gordon and renew his summary judgment motion.

This is a close case. Regarding the first ***Harris*** factor, the new evidence sought to be introduced by the Howells was admittedly available prior to the trial court's ruling on Dr. Price's motion for summary judgment. The Howells were aware of Dr. Price's objections to the affidavits, yet chose not to submit additional evidence to cure the claimed defects.

As noted above, however, the ***Harris*** court explicitly rejected the "new evidence" rule, and the other enumerated factors must be taken into consideration. ***Harris***, 33 S.W.3d at 745-46. The second ***Harris*** factor weighs heavily in favor of considering the new evidence. Dr. Gordon's affidavit was crucial to the Howells' malpractice claims; without it, the necessary standard of care cannot be proven with respect to any of the claims.

As for the third ***Harris*** factor, the Howells' reason for not submitting the additional evidence is tenable. Again, the Howells argue that they failed to submit the additional evidence because they believed that the affidavits were sufficient to defeat Dr. Price's motion. Indeed, the trial court's finding that Dr. Gordon's affidavit was insufficient is upheld on appeal primarily in light of the high standard of review, abuse of discretion, for such determinations. This is not a case in which the plaintiffs' expert attempts to claim familiarity with the standard of care in a community in which he has never practiced. Summary judgment is often granted in favor of defendant physicians in cases in which the plaintiff's expert claims to have sufficient knowledge of the standard of care in the locality of the defendant's practice, but the claim is found to have been based on untrustworthy data. ***See Tilley***, 2002 Tenn. App. LEXIS 349, at *19 (discrediting expert's claim that he was familiar of standard of care in the pertinent community because his deposition testimony revealed that his claim was not based on trustworthy facts); ***Stovall v. Clarke***, No. M2001-00810-COA-R3-CV, 2002 Tenn. App. LEXIS 437, at *20-*21 (Tenn. Ct. App. June 20, 2002) (holding that merely claiming knowledge of standard is conclusory and insufficient to establish plaintiff's case when supplemental testimony was merely a reaction to the experts' lack of geographic information and medical statistics); ***Smith v. Haley***, E2000-002103-COA-R3-CV, 2001 Tenn. App. LEXIS 136, at *18 (Tenn.

Ct. App. March 2, 2001) (refusing to set aside summary judgment that was based on fact that plaintiff's expert's affidavit was untrustworthy and case had been pending over five and one-half years); ***Church v. Perales***, 39 S.W.3d 149, 167 (Tenn. Ct. App. 2000) (stating that "[e]xpert opinions having no basis can properly be disregarded because they cannot materially assist the trier of fact"); ***Mabon***, 968 S.W.2d at 831 (rejecting expert's allegation that he is familiar with the applicable standard of care when deposition testimony reveals that he is not familiar with standard in that locality).

In this case, it is undisputed that Dr. Gordon's original affidavit indicates that he was licensed to practice in Tennessee at all pertinent times, and that he had been "an Associate Professor of Anesthesiology at Vanderbilt University Hospital," which is in Nashville, for some period of time. It also states that he was familiar with the standard of care in "Middle Tennessee," which geographically includes Nashville. In the amended affidavit, the Howells more specifically set out that Dr. Gordon was an associate professor at Vanderbilt University Hospital "from 1988 to the present," and that he was familiar with the standard of care "in Nashville" at the pertinent time. The revised affidavit clarifies Dr. Gordon's assertion that he had been working in Nashville during the pertinent time period; it does not introduce a new locale of expertise.[11]

With respect to factor four, we find that Dr. Price would not be unfairly prejudiced by allowing the Howells to submit the additional evidence. To be sure, he would be prejudiced, because allowing the trial court to reconsider its previous ruling in light of the additional information could possibly revive a claim against him that had been dismissed. However, since Dr. Price has the opportunity through discovery to obtain support for his assertion that Dr. Gordon is not competent to testify, any prejudice to Dr. Price is not unfair prejudice.

Considering all of the facts and circumstances of this case, we must conclude that the trial court abused its discretion in failing to consider the additional evidence submitted by the Howells for purposes of determining whether to revise its order granting summary judgment to Dr. Price. Therefore, we reverse the trial court's decision not to consider the amended affidavit and curriculum vitae and remand for reconsideration of the grant of partial summary judgment in light of the new evidence.

Dr. Price argues that the trial court was correct in determining that Dr. Gordon's original affidavit was insufficient to show that he was familiar with the applicable recognized standard of acceptable professional practice for a gastroenterologist in performing an EGD procedure. The original affidavit stated that Dr. Gordon was "familiar with the recognized level of acceptable professional practice regarding the treatment of patients undergoing endoscopic medical procedures." Dr. Gordon's amended affidavit included language stating that he was "familiar with the recognized standard of acceptable professional ***care and*** practice ***for gastroenterologist[s] in*** the treatment of

[11] In point of fact, had the trial court denied Dr. Price's motion for summary judgment and concluded that, considering Dr. Gordon's affidavit in the light most favorable to the Howells, Dr. Gordon's affidavit was sufficient, this decision likely would also have been upheld on appeal, considering the abuse of discretion standard of review.

patients undergoing endoscopic medical procedures." Under Tennessee Code Annotated § 29-26-115, the plaintiffs' expert witness need not practice in the same specialty of the medical profession as the defendant. ***See Ledford v. Moskowitz***, 742 S.W.2d 645, 647 (Tenn. Ct. App. 1987). Rather, the expert must "demonstrate that he or she practices in a profession or specialty that makes the affiant's opinion relevant to the issues in the case." ***Church***, 39 S.W.3d at 166. Dr. Gordon is an anesthesiologist, whose testimony would be relevant to some, but not necessarily all, issues in this case. On remand, the trial court may determine the issues to which Dr. Gordon's testimony is relevant, in light of the assertions in the amended affidavit and curriculum vitae.

Accordingly, we affirm in part and reverse in part the decision of the trial court, and remand for further proceedings not inconsistent with this Opinion. Costs are to be taxed equally to the appellants, Mildred and Dillon Howell, and their surety, and the appellee, Neil Price, M.D., for which execution may issue, if necessary.

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HOLLY KIRBY LILLARD, JUDGE